FILE COPY

FILED
FEB 4 1933
CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 470

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS,

vs.

NORTHERN PACIFIC RAILWAY COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR APPELLEES.

M. L. COUNTRYMAN, JR.,
Attorney for Appellees.

D. F. LYONS,
F. G. DORETY,
J. N. DAVIS,
P. F. GAULT,
A. H. LOSSOW,
R. J. HAGMAN,
J. P. PLUNKETT,
Of Counsel.

INDEX.

Page

STATEMENT OF THE CASE 1

The proceedings before the Commission 2

The report and order in question 10

Changed conditions and the petition for rehearing on account thereof 15

SUMMARY OF THE ARGUMENT 22

ARGUMENT 25

I. The District Court did not err in finding and holding that the Commission exceeded its powers in denying the petition for rehearing in respect of changed conditions, filed February 3, 1932..... 25

(a) The circumstances here present do not differ materially from those considered in Atchison, Topeka & Santa Fe Ry. Co. v. United States, 284 U. S. 248 25

(b) The action taken by the Commission in Fifteen Per Cent Case, 1931, did not relieve it of the duty to rehear this case in respect of changed conditions 31

(c) Appellees were not guilty of laches justifying denial of a rehearing in respect of changed conditions 32

II. The decree is right and should be affirmed for invalidity of the Commission's order upon the other grounds alleged in the bill 34

(a) The Commission's order is void because of its attempt to exercise a power, not pos-

sessed by it, arbitrarily to reduce otherwise lawful rates because of their relation to other rates not in issue which were not a proper standard of maximum reasonable rates 35

(b) The order is void because the hearing accorded the carriers was inadequate and manifestly unfair 39

CONCLUSION 41

APPENDIX 42

CASES CITED.

Page

Ann Arbor R. Co. v. United States, 281 U. S. 658..... 38

Atchison, Topeka & Santa Fe Railway Co. v. United States, et al., 284 U. S. 248 .....22, 25, 41

Caldwell & Taylor v. C. R. I. & G. Ry. Co., 144 I. C. C. 448, 449 3

Codington County Oil Co. v. A. T. & S. F. Ry. Co., 53 I. C. C. 234 4

Empire Refineries v. A. T. & S. F. Ry. Co., 136 I. C. C. 344, 346 3

Fifteen Per Cent Case, 1931, 178 I. C. C. 539.....
.....16, 17, 20, 22, 23, 28, 30–33

Independent Home Oil Co. v. Director General, 59 I. C. C. 398 4

International Oil Co., et al. v. A. & S. Ry. Co., et al., 179 I. C. C. 435 5

Interstate Commerce Commission v. Illinois Central Railroad, 215 U. S. 452 37

Interstate Commerce Commission v. Louisville & Nashville Railroad, 227 U. S. 88, 91 ..... 37, 38, 41
Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U. S. 541 ..... 26, 37
Investigation and Suspension Docket No. 3148, Petroleum and Its Products from Points in Wyoming, 153 I. C. C. 363 7
Langnes v. Green, 282 U. S. 531, 538 35
Louisville & Nashville Railroad Company v. United States, 238 U. S. 1, 12 36
Midcontinent Oil Rates, 1915, 36 I. C. C. 109 3
Midcontinent Oil Rates, 1925, 112 I. C. C. 421 ..... 3, 4, 5, 6, 9
Midcontinent Oil Rates, 1925, Second Supplemental Report of the Commission, 139 I. C. C. 605 5
Petroleum and Its Products, 171 I. C. C. 286, 308 3
Rates on Petroleum and Its Products in Montana, 176 I. C. C. 707 13
Refined Petroleum Products in the Southwest, 171 I. C. C. 381, 414, 424 3
Sames, Moore & Company v. A. T. & S. F. Ry. Co., 113 I. C. C. 501, 506 27
South Dakota Independent Oil Jobbers Asso. v. A. T. & S. F. Ry. Co. 4
Southern Pacific Company v. Bogert, 250 U. S. 483 33
Southern Pacific Company v. Interstate Commerce Commission, 219 U. S. 433 ..... 37, 38
Tift v. Southern R. Co., 138 Fed. 753 27
United States v. American Ry. Express Co., 265 U. S. 425, 435 35

IN THE

Supreme Court of the United States

October Term, 1932

No. 470

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,

Appellants,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, et al.,

Appeal from the District Court of the United States for the District of Minnesota.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

The brief for the United States and Interstate Commerce Commission does not contain all that is material to the consideration of the questions presented, which include whether the Commission's order of December 1, 1931, is void *for any*

of the reasons presented by the record. Appellees contend that notwithstanding the contrary opinion of the specially constituted District Court, the Commission's order is void because of attempt by the Commission to exercise powers not possessed by it, and because of the arbitrary and unfair manner in which the proceedings were conducted. The District Court held this order invalid only for refusal of the Commission to grant the petition of the carriers for rehearing because of changed conditions. Consideration of these three questions requires a more complete statement of the facts than is contained in the brief for appellants.

(Note: Reference to sections of the Interstate Commerce Act throughout this brief are to the act to regulate commerce, approved February 4, 1887, as amended, and the pertinent portions thereof are set forth in the appendix, *infra* pp. 42-44).

The Proceedings Before the Commission.

The destination territory involved in this case, namely, North Dakota and that portion of Minnesota lying west of the line of the Great Northern Railway from Duluth, Minnesota, to Pipestone, Minnesota, is keenly competitive for the marketing of refined petroleum products as between the refiners and producers located in the midcontinent field in the Southwest and the producers and refiners of petroleum products in Wyoming and Montana. The volume of business done by the respective producing fields depends to a considerable extent upon the relationship between the freight rates here in question and the freight rates from Wyoming and Montana to the same destinations (R. 4, 112-114). Shipments of refined petroleum products to this destination territory are also made from a tank farm situated at Superior, Wisconsin, and from a pipe line head at St. Paul (R. 263). Appellees are the delivering lines for all of

this traffic and must maintain properly related rates from all shipping points.

For many years a subnormal and depressed adjustment of freight rates on refined petroleum products has obtained from the midcontinent field to Duluth, the Twin Cities and certain so-called gateway points intermediate thereto such as Willmar, Minnesota, Sioux Falls, South Dakota, and Sioux City, Iowa. These depressed rates are the result of pipe line competition from the oil fields in the Southwest to refineries in the vicinity of Chicago, Illinois (R. 26), and have been twice revised by the Interstate Commerce Commission for the purpose of removing undue prejudice, but without any attempt to fix maximum reasonable rates. *Midcontinent Oil Rates, 1915,* 36 I. C. C. 109; *Midcontinent Oil Rates, 1925,* 112 I. C. C. 421. Each of these revisions resulted in reductions in rates from the Southwest to Duluth, the Twin Cities and intermediate points, in order to relate them more closely to the rates to Chicago (R. 86). In a series of subsequent reports, the Commission consistently refused to accept any of the rates prescribed in these revisions as a proper standard for measuring the reasonableness of other rates, and affirmed them to be below the level of reasonable maximum rates.

Empire Refineries v. A. T. & S. F. Ry. Co., 136 I. C. C. 344, 346.

Caldwell & Taylor v. C. R. I. & G. Ry. Co., 144 I. C. C. 448, 449.

Petroleum and Its Products, 171 I. C. C. 286, 308.

Refined Petroleum Products in the Southwest, 171 I. C. C. 381, 414, 424.

The Commission continued of the same view in its report of December 1, 1931, in the case now before the Court (R. 127).

On account of the low level of the rates thus required from the Southwest to the Twin Cities and intermediate points, joint rates on refined petroleum products from the midcontinent field to destinations in South Dakota, North Dakota, and northwestern Minnesota, were originally made on a combination basis by adding to the low rates to the border or gateway points the local rates beyond, and deducting 5.5 cents per 100 pounds from the resulting combination in order to avoid the double application of increases applied during federal control to the separate factors (R. 77, 83). This method of making the rates to the territory in question was found not unreasonable by the Commission in *Codington County Oil Co. v. A. T. & S. F. Ry. Co.*, 53 I. C. C. 234, and *Independent Home Oil Co. v. Director General*, 59 I. C. C. 398 (R. 77, 84).

When the Commission conducted its investigation in *Midcontinent Oil Rates, 1925*, numerous complaints of undue prejudice brought by operators of petroleum refineries in the Southwest were heard together upon a consolidated record. One of the issues raised was the alleged unreasonable and unduly prejudicial character of the petroleum rates from the Southwest to destinations in northern Nebraska, South Dakota, North Dakota, and in Minnesota west of the line from Duluth to Sioux Falls. Certain interveners from North Dakota, who supported the complainants, contended that the method of constructing rates approved in the *Codington County Oil Co.* case and the *Independent Home Oil Co.* case was wrong in principle, and that in order to be reasonable, rates "must not only be reasonable in themselves but must be properly related to the rates to other points" (R. 43). The Commission stated that the record before it was inadequate to enable it to dispose of this issue; that the rates to South Dakota were under attack in another proceeding, known as No. 16309, *South Dakota In-*

dependent Oil Jobbers Asso. v. A. T. & S. F. Ry. Co., particularly in their relation to the rates to points in Iowa and southern Minnesota, and that "under the circumstances, it appears desirable to withhold specific findings in this report with respect to rates to this western territory, and accordingly these cases, in so far as they involve such rates, will be held open for further consideration in connection with No. 16309" (R. 44).

The complaint in No. 17304, *International Oil Co., et al. v. A. & S. Ry. Co., et al.*, the case now before the court, had been theretofore filed with the Commission and heard upon a separate record at Fargo, North Dakota in October, 1925 (R. 4, 5). This complaint alleged that the rates on petroleum and its products from Texas, Oklahoma, Kansas and Missouri to destinations in North Dakota and in Minnesota north and west of the line of the Great Northern from Duluth to Pipestone, Minnesota, were unreasonable (R. 76). There was no allegation of undue prejudice or unjust discrimination (R. 5), and complainants did not seek the prescription of any fixed *relationship* between the rates assailed and other rates.

On March 5, 1928, the Commission made and filed its report entitled "Midcontinent Oil Rates, 1925, Second Supplemental Report of the Commission" (139 I. C. C. 605, R. 75). This report deals separately with the issues in Nos. 16309 and 17304, and the issues of undue prejudice in the complaints which had been consolidated in *Midcontinent Oil Rates, 1925*.

Dealing with the complaint in No. 16309, the Commission found that "Complainants in No. 16309 distribute petroleum products in competition with distributors in northwestern Iowa, southwestern Minnesota and southeastern South Dakota who enjoy very much lower freight rates from the midcontinent field," and said "We are of opinion that rates on petroleum products from the midcontinent field to South Dakota may

properly be maintained on a higher relative level than the rates which we have prescribed to Sioux City, but that existing differences are not justified" (R. 79). Dealing with the complaint in No. 17304, the Commission recited the evidence and referred to the contentions of the carriers that the rates from Wyoming and Montana to North Dakota and Minnesota were made with relation to the rates from the base group in the midcontinent field, and that the latter rates should not be reduced because of the effect of such reductions upon the rates from Wyoming and Montana (R. 84), and also to the evidence of the carriers with respect to their unsatisfactory earnings from all traffic. The Commission prescribed reduced rates to the entire territory, effective June 14, 1928, and explained its action by stating that the reductions required were of the same nature and were a part of the same general readjustment as the reductions previously prescribed to Sioux City, Sioux Falls and the Twin Cities, which it said "had for their purpose the creation of a more consistent and reasonable relationship of rates as between those points and other points in western trunk line territory" (R. 86). The Commission further stated that it was "fully mindful of the revenue needs of these various carriers, but, as we have frequently said, lack of adequate revenue from operations as a whole affords no justification for unlawful rates on individual commodities" (R. 85).

The interested carriers, including appellees, were greatly dissatisfied with this report and order. On May 4, 1928, they petitioned the Commission to postpone its effective date, to reopen Nos. 16309, 17304, and *Midcontinent Oil Rates, 1925*, and to grant them a further hearing of said proceedings upon a common record in order to permit them to offer further evidence respecting the level of the rates to the gateways and other points in Nebraska, Iowa, and Minnesota, and to points

beyond the gateways in South Dakota, North Dakota and Minnesota. In this petition they offered to prove the serious effect the reductions required would have upon their revenues and earnings, their unsatisfactory financial condition, the effects of growing truck competition upon their other traffic, fostered by low rates on gasoline, and the propriety of adjusting the rate relationships deemed improper by authorizing them to increase the rates to the gateways instead of compelling them to reduce the rates to the territory beyond. This petition was denied by the Commission on February 11, 1929 (R. 7, 153, 248).

Following the establishment of the reduced rates from the midcontinent field required by the Commission, effective June 14, 1928, appellees proceeded to make corresponding reductions in the rates on petroleum and its products from Wyoming producing points to the same destinations in order to prevent a threatened diversion of traffic. These reductions were suspended by the Commission, and ordered cancelled after investigation and hearing in a proceeding entitled *Investigation and Suspension Docket No. 3148, Petroleum and Its Products from Points in Wyoming*, 153 I. C. C. 363, issued March 30, 1929, (R. 111). The Commission therein found that "The proposed rates from Casper are relatively lower, distance and transportation conditions considered, than the rates from the midcontinent field" (R. 113); that in fixing rates to South Dakota, North Dakota and western Minnesota from the midcontinent fields it had necessarily considered and passed upon the relationships between those rates and the rates from Wyoming, and that "*Where rates from various origin territories on the same commodities to common destinations served by the same carrier are fixed by us under section 1 of the act their relationship is necessarily involved*" (R. 116). (Italics ours.)

While the Investigation and Suspension proceeding above mentioned was pending, and on November 30, 1928, a distributor

of petroleum products at Jamestown, North Dakota, filed complaint with the Commission, docketed as No. 21737, attacking as unreasonable the rates on petroleum and its products established June 14, 1928, from the midcontinent fields to Jamestown, Buffalo, Valley City and Cleveland, North Dakota (R. 8). The claim was merely that the rates prescribed to these points were out of line with the rates contemporaneously prescribed to adjacent points (R. 122). It was heard at Jamestown, North Dakota, on March 6, 1929, and the record closed (R. 9). It was disposed of in the report of the Commission which is now before the court for review (R. 121).

Thereafter, on April 19, 1929, complainants in No. 17304 filed a petition for further hearing, alleging and offering to prove that to various points in North Dakota the shortest distances from the midcontinent field were over routes passing through Aberdeen or Roscoe, South Dakota, and that in arriving at the rates prescribed to North Dakota points, the Commission had disregarded the short line distances and the rates contemporaneously prescribed to intermediate South Dakota points, and had, in consequence, fixed rates which were unjustifiably high as compared with the rates prescribed to South Dakota points and to the gateways in Minnesota. This petition was granted by the Commission by order entered June 10, 1929, reopening the case for further hearing (R. 9, 249).

On September 16, 1929, the Standard Oil Company of Indiana, engaged in the operation of refineries at Casper, Wyoming, filed with the Commission a complaint alleging that the rates on petroleum and its products from Casper, Wyoming, to destinations in the states of North Dakota, South Dakota, Iowa, and Minnesota were and for the future would be unreasonable, in violation of section 1 of the Interstate Commerce Act, and *unduly prejudicial to complainant and unduly prefer-*

ential of producers and shippers located in the midcontinent field, in violation of section 3 of the Act. On September 19, 1929, a complaint presenting similar issues was filed with the Commission by the Public Service Commission of Wyoming. These complaints were docketed by the Commission as Nos. 22714 and 22733, respectively (R. 9, 10, 152, 249).

On December 12, 1929, appellees were served by the Commission with notice that No. 17304 was assigned for further hearing at Fargo, N. D., on January 13, 1930. They promptly applied to the Commission by letter (R. 118), and by formal petition filed with the Commission on January 3, 1930 (R. 11, 152, 249), requesting the Commission to consolidate Nos. 17304, 22714 and 22733 for hearing and decision upon a common record, and to postpone the hearing set for January 13, 1930, in No. 17304. These requests were denied by the Commission, and hearing was held beginning January 14, 1930, and the record closed January 15, 1930 (R. 233).

In addition to the last mentioned petition, appellees and their connections filed with the Commission on January 14, 1930, a petition requesting it to reopen *Midcontinent Oil Rates, 1925*, and to consolidate with it Nos. 22714 and 22733 and all other pending complaints involving rates on petroleum products to destinations in western trunk line territory, and to set the proceeding down for further hearing with respect to the rates to the key or gateway points such as Lincoln and Omaha, Nebraska, Des Moines, Fort Dodge, Sioux City and Mason City, Iowa, Sioux Falls, South Dakota, and St. Paul and Duluth, Minnesota, and also with respect to the rates to the territory beyond such gateway points (R. 12, 249). By order entered April 14, 1930, the Commission denied this petition (R. 250). The Commission thereafter proceeded with the

investigation of the complaints in Nos. 22714 and 22733, and held a hearing thereon at Chicago, Illinois, which began on April 23, 1930, and was concluded on May 1, 1930 (R. 265). At the time this is written (January 25, 1933), no report has been made by the Commission, presumably because the rates to be prescribed from Wyoming are dependent upon the outcome of this case.

The Report and Order in Question.

On December 1, 1931, the Commission made and filed the Report and Order which is the subject of this case, further reducing the rates in question. Three Commissioners dissented from the Report. Commissioner Mahaffie, dissenting, said (R. 130):

> "Revision of rate adjustments upon such precedents as the majority here use and the condemnation of rates previously prescribed as reasonable usually result, as they result here, in rates so low as to make unwarranted reductions in carrier revenue."

The present rates and the reduced rates prescribed to become effective March 15, 1932, are shown in columns (B) and (F) respectively of Appendix B to the Commission's report (R. 132-144). The mathematical average of the reductions prescribed to the 368 destinations named in Appendix B is 7.5 cents per 100 pounds, and the average percentage reduction is 10.2 per cent. The resulting loss of revenues to the participating carriers approximates $600,000 annually (R. 18), of which about $130,000 would be sustained by the Great Northern (R. 261), and about $98,000 by the Northern Pacific (R. 257). The following table shows to representative destinations the rates from the base group which were in effect prior

to June 14, 1928, the rates prescribed by the Commission effective on that date, and the rates required by the order here under review:

To	Old Rate (R. 87)	Rate Prescribed June 14, 1928 (R. 87)	Rate Prescribed March 15, 1932 (R. 132)
Fergus Falls, Minn.	64	61	55
Wadena, Minn.	62.5	62.5	55
Fargo, N. D.	70	62	57
Grand Forks, N. D.	75.5	70	63
Devils Lake, N. D.	83.5	74	70
Jamestown, N. D.	81	76	63
Minot, N. D.	92	81	75
Bismarck, N. D.	94.5	82	70
Dickinson, N. D.	107	88	78

The order is based on the following formal finding (R. 129):

> "Upon the whole record now before us, we find that the rates assailed prior to June 14, 1928, were not unreasonable; that those applicable on and after that date were unreasonable only in the instances and to the extent they exceeded the rates shown from Group 3 in column H of Appendix B hereto, plus or minus the differentials from other origin groups to Willmar and St. Paul, Minn.; and that on and after the effective date of our order for the future, the rates assailed will be unreasonable to the extent they exceed or may exceed those shown from Group 3 in column F of Appendix B, plus or minus said differentials from other origin groups."

The finding of past unreasonableness means only that in a few instances the cariers failed to comply fully with the instructions in the Commission's prior report to revise the rates to all points in proper relation with those prescribed to the key

points (R. 128), and is merely a construction by the Commission of its prior order. The rates which the Commission indicates should have been published are now in effect, and are not questioned by appellees.

The apparent conflict between the Commission's formal finding that the rates in effect prior to June 14, 1928, were not unreasonable and its equally formal finding that lower rates established on that date would be unreasonable after March 15, 1932, unless substantially reduced, was characterized by complainants in a petition for rehearing of the question of reparation filed February 13, 1932 (R. 154), as "a most remarkable paradox" (R. 230), because the record before the Commission did not contain a scintilla of evidence to justify a finding that a different and higher level of rates was warranted prior to June 14, 1928, or after that date than for the future (R. 239). But the Commission's finding that the rates would be unreasonable for the future did not mean that the Commission deemed them inherently unreasonable or excessive for the service rendered. This is made evident by the following findings and recitals in the report:

1. The Commission condemned the rates in question for the future, solely because of their relation to the rates previously prescribed from the midcontinent field to South Dakota and the gateway points in Minnesota. Under the heading "Rates for the Future" it said (R. 126):

> "The record on further hearing demonstrates the necessity of a further revision of the rates assailed to bring about a reasonable and consistent adjustment. The present rates grade up too rapidly beyond the gateways on the eastern border of the destination territory and as the state line is crossed from South Dakota into North Dakota; * * * the rates to North Dakota especially are on too

high a level compared with the rates prescribed to South Dakota; and those from Kansas City to North Dakota are generally higher than the Wyoming-Montana scale recently prescribed in Rates on Petroleum and its Products in Montana, 176 I. C. C. 707."

In describing the nature of the rates prescribed for the future, and their percentage relation to certain constructive first class rates, the report continues (R. 127):

"The proposed rate from Group 3 to Fargo is 22.5 per cent, which is the same as the average under the rates prescribed to points in eastern South Dakota; that proposed to Jamestown, 980 miles, is 25 per cent and the same as that previously prescribed to Mobridge, S. Dak., 974 miles; and that proposed to Bismarck, 1055 miles, is 26.5 per cent and the same as that previously prescribed to Lemmon, S. Dak., 1073 miles. These rates will not only be in harmony with those previously prescribed to South Dakota, but considering the respective territories through which the traffic moves, also in line with those recently prescribed from Wyoming points to Montana points in Rates on Petroleum and its Products in Montana, supra."

The Commission's report in *Rates on Petroluem and its Products in Montana,* 176 I. C. C. 707, shows that the case was submitted on July 1, 1931, and decided July 13, 1931, almost exactly 18 months after the record in No. 17304 was closed. The Commission in its answer denies that it considered anything outside the record in reaching its conclusions (R. 153), and it seems apparent that the rates prescribed in the Wyoming-Montana case had no real bearing on the determination of the reduced rates in controversy, for the appendixes to the Commission's report in that case (171 I. C. C. 741, 742) show that the maximum reasonable rates therein prescribed were made uniformly 32 per cent of the first class rates prescribed

by the Commission for application in western trunk line zone III and subzone III, whereas the rates prescribed in the instant case range from 20 per cent to a maxiumum of 29.5 per cent, and for the most part are about 24 per cent of the first class rates under the Southwestern scale used by the Commission "simply as a convenient yardstick and not on the assumption that it would be proper for application to all points in the destination territory" (R. 127). Shortly after the hearing in the court below in this case, the Commission, by public announcement, reopened the Wyoming-Montana case for further hearing in respect of changed economic conditions affecting the level of the rates, a fact of which the court can probably take judicial notice.

2. The Commission disclaimed any opinion or belief that the rates prescribed in its prior reports from the midcontinent field to the gateways or to points in South Dakota were maximum reasonable rates (R. 125).

Commissioner Mahaffie, dissenting from the majority says (R. 130): "The adjustment here required is based very largely upon our previous findings in the Midcontinent Cases, which we have repeatedly stated required rates below reasonable maxima." No language was placed in the majority report to indicate that the majority took any different view of the matter.

The report contains no finding or recital of any undue prejudices or preferences or unjust discriminations, requiring the revision prescribed, nor any finding or recital to indicate that there was any commercial necessity for such a revision. It refers to the contentions of appellees on this point and disposes of them summarily, as follows (R. 126):

> "Defendants contend that the rates assailed should not be measured by the rates prescribed to South Dakota be-

> cause the traffic here considered does not normally move through that state; because the rates thereto bear no necessary relation to those to North Dakota; and because they are unduly low. The first two grounds relied upon were not recognized in recent decisions in which we prescribed a uniform level of rates on traffic from the Southwest to the eastern sections of both states."

The Commission found as a fact that the principal routes that move the bulk of the traffic in question are through St. Paul and not through South Dakota (R. 123), and that the lines performing the service to the Twin Cities handle the traffic in train loads to that point (R. 126). But in relating the assailed rates to the South Dakota rates, the Commission used the mileages over the short routes through South Dakota instead of the mileages over the longer routes customarily used in handling the traffic (R. 87, 132).

In making this decision the Commission put out of view and refused to consider the relationship of the assailed rates to the competitive rates to the same destinations from other producing fields. The report contains the following statement (R. 121):

> "The Standard Oil Company (Indiana) also intervened, taking the position that the relationship of the rates assailed to those from Casper, Wyo., should be considered in this proceeding. That relationship is not brought in issue by the complaints, however, and will not be considered."

Defendants' comparisons between the assailed rates and those from Wyoming were rejected with the statement that "These are not determinative of the issue in the absence of a showing that the scales used for comparative purposes accurately reflect the difference in transportation conditions" (R. 125). Thus, instead of *investigating* these relationships, and reaching some *conclusions* thereon, the Commission dismissed the sub-

ject from consideration and left it for subsequent determination in the proceedings pending on the complaints of the Standard Oil Company and the Public Service Commission of Wyoming in Nos. 22714 and 22733, which it had refused to consolidate with No. 17304. The following table prepared from tables contained in the several reports of the Commission (R. 117, 132) shows the rates from Casper, Wyoming, to representative points as compared with the present rates and those required by the Commission's order from the base group in the midcontinent field:

	From Casper		From Group 3		
				Present	Prescribed
To	Miles	Rate	Miles	Rate	Rate
Fargo, N. D.	794	70	990	62	57
Grand Forks	872	74.5	1068	70	63
Jamestown	766	70	980	76	63
Minot	782	70	1141	81	75
Bismarck	776	70	1055	82	70
Dickinson	661	70	1170	88	78

Changed Conditions and the Petition for Rehearing on Account Thereof.

After the close of the record before the Commission on January 15th, 1930, economic conditions and transportation conditions in the United States changed radically. In a report issued October 16, 1931 (*Fifteen Per Cent Case, 1931*, 178 I. C. C. 539) the Commission recited the changes (R. 185), and found that the changed conditions exerted a profound influence on railroad rate policies (R. 199), and said (R. 200): "So far as rates are concerned, it is clear that the present structure has developed under principles and theories which gave no thought to the competitive agencies of transportation which

now exist. * * * It is evident that the traffic departments must give new thought to the rate structure in the light of existing conditions."

These changed conditions did not immediately become apparent to appellees but early in 1931 they became sufficiently clear to require some action. Appellees did not at once apply to the Commission for a reopening of No. 17304 for further hearing with respect to such changed conditions. The Commission had consistently refused to consider their general financial situation in this proceeding, upon the ground that "lack of adequate revenue from operations as a whole affords no justification for unlawful rates on individual commodities" (R. 85), and had denied every petition and request presented by them, and it was unlikely that a petition for further hearing would be granted. Appellees and other railroads in the United States accordingly pursued what they believed to be the only practical remedy available to them, and on June 17, 1931, filed a petition with the Commission for an emergency increase of fifteen per cent in all freight rates and charges. They therein contended that in a proceeding involving the general level of all rates, the revenue consideration was necessarily paramount and controlling (R. 177). By its report issued October 16, 1931, in *Fifteen Per Cent Case, 1931*, above mentioned, the Commission denied this increase, holding that the law had not made revenue needs the paramount and controlling factor in the determination of a reasonable general level of rates (R. 180), that a 15 per cent increase in all freight rates and charges would increase revenues only temporarily, if at all, and would eventually harm rather than help the railroads, and that such an increase would raise the rates on many kinds of traffic, particularly products of agriculture and livestock, above a just and reasonable level (R. 192). The Commission offered for the consideration of the

railroad executives a substitute plan for small increases in the rates on certain groups of commodities, conditioned upon the pooling of the resulting revenues, such increases to expire on March 31, 1933 (R. 193, 194). The condition as to pooling was not acceptable to the railroads, and in a supplemental report issued December 5, 1931, this condition was withdrawn upon the understanding that the railroads would put in effect their own plan for marshalling the proceeds and making loans therefrom to needy carriers (R. 204 et seq.). The increase authorized on refined petroleum products was one cent per hundred pounds, to expire March 31, 1933, unless extended by the Commission.

The temporary rate increases thus authorized were not intended by the Commission as a full discharge of the duty imposed upon it by section 15a (2) of the Interstate Commerce Act. The Commission said that it felt justified in endeavoring by an emergency rate increase to provide revenue sufficient only to meet actual interest charges, but not justified in doing more under existing conditions because of the doubt as to whether the traffic generally could stand greater increases (R. 194). It expressed the belief that the traffic departments of the railroads should study their rate structures with a view to making such changes in the rates on particular kinds of traffic as would be likely to increase their revenues, saying that it was likely that there were a considerable number of rates which could reasonably be advanced substantially even under present conditions (R. 192).

The report and order in the instant case was not served on appellees until about December 21, 1931 (R. 12). On February 3, 1932, they filed with the Commission on behalf of themselves and their connections a petition dated January 30, 1932, asking the Commission to vacate and set aside, or postpone the

effective date of the order, and to grant them a rehearing and reconsideration thereof, and to reopen said proceeding for the taking of further evidence, in order to permit them to show changed conditions since the record was closed (R. 17, 146 et seq.).

The petition alleged and offered to prove that since the record was closed the principal carriers affected by the order had suffered a decline of 32.48 per cent in freight traffic and 37.02 per cent in passenger traffic, and a decline of 33 per cent in gross revenues and 60 per cent in net revenues; that in 1931 their combined net incomes were insufficient to meet their fixed charges by nearly $6,000,000.00; that the decline in traffic and revenues was due to a change in economic conditions and in methods of transportation and distribution, as a result of which their freight rate structures were undergoing many revisions, including rate reductions to meet the competition of other forms of transportation, which would necessitate rate increases on other traffic able to pay increased rates; that the traffic affected by the order was moving freely and had increased in volume under the existing rates, due, perhaps to the increased activity of motor trucks; that in the opinion of petitioner's traffic officers said rates could reasonably and profitably be advanced, even under existing conditions, without unduly burdening the traffic or diverting it to other means of transportation, and that if the order should become effective it would directly reduce the gross and net revenues of the interested carriers by about $600,000.00 per year, and would indirectly reduce the gross and net revenues of appellees by further large amounts. The petition further alleged that the reductions required by the order were based on the existence of lower rates to South Dakota and gateways on the eastern border of the destination territory; that said rates were prescribed by the Commission

upon records closed during the year 1925; that the traffic and transportation conditions existing in 1925 and prior years were wholly different from those existing now, and that under present conditions said rates were unduly and unreasonably low and should be increased.

Complainants in No. 17304 filed a reply to this petition (R. 241 et seq.). The facts alleged in the petition were not questioned or controverted in this reply. It was contended simply that the petition should be denied because: (1) the case did not involve the entire rate structure of all the carriers in a major rate group, but affected "particular rates" only; (2) neither the inadequacy of the general revenues of the carriers nor changed conditions affecting those revenues was relevant or material to the question of the reasonableness of these rates, and (3) the Commission had fully provided for the revenue needs of the carriers through the temporary rate increases authorized in *Fifteen Per Cent Case, 1931,* and if any further relief were required it should be accorded by the application of similar measures to the whole fabric of rates. On March 7, 1932, the Commission entered an order denying the petition of February 3, 1932, in its entirety (R. 154).

The truth of the facts alleged in the petition for rehearing filed with the Commission is not questioned in this case. The bill alleges (par. XXIII, R. 17) that "Each and all of the facts alleged in said petition are true." This allegation is not denied in the Commission's answer, which merely refers to the reply to the petition filed by complainants (R. 154). It is tacitly admitted in the answer of the United States, which alleges that the truth thereof is irrelevant and immaterial in this case (R. 252). The effect of the changed conditions in the territory in question upon the freight revenues of Northern Pacific Railway Company, one of the important delivering lines, was shown

by the affidavit of F. C. Sharood (R. 258, 259) upon the hearing in the court below, and that court found that "The general effect of the change in economic conditions upon the revenues of these and other carriers is a matter of common knowledge" (R. 294), and that "a record closed January 15, 1930, was not representative of conditions existing in March, 1932" (R. 295).

SUMMARY OF THE ARGUMENT.

I.

The decree below enjoining the Commission's order because of its refusal to accord the carriers a hearing in respect of changed conditions was manifestly right. The arguments of appellants to the contrary misconceive the principle applied in *Atchison, Topeka & Santa Fe Railway Company v. United States,* 284 U. S. 248. The changed conditions requiring a rehearing in the instant case were not merely reduced carrier revenues, but were economic and transportation conditions which were relevant and material to the determination of a maximum reasonable level of rates on refined petroleum products from the entire southwestern portion of the United States to the large destination territory in question. Moreover, the decline in carrier revenues, if not otherwise relevant, was made relevant and material in this case by the conclusions reached by the Commission in *Fifteen Per Cent Case, 1931.*

The action taken by the Commission in *Fifteen Per Cent Case, 1931,* did not justify the Commission in refusing to grant a rehearing in respect of changed conditions occurring since the close of the record in this case, because the Commission had not undertaken to determine what level of rates might reasonably be maintained on refined petroleum products in the territory in question in relation to the rates contemporaneously maintained on other commodities, and the action taken by the Commission in *Fifteen Per Cent Case, 1931,* did not purport to be fully responsive to the needs of the carriers for increased revenues.

Appellees were not guilty of such laches as deprived them of their right to a rehearing in respect of changed conditions, be-

cause they moved for such rehearing with reasonable promptness after receiving notice of the order in this case, and had previously been pursuing their rights with diligence in *Fifteen Per Cent Case, 1931.*

II.

The order is void because the Commission misconceived its powers in the premises and attempted to exercise a power not possessed to reduce rates which were not unreasonable or unlawful, in the interests of a supposed harmony in the petroleum rate structure. The Interstate Commerce Act does not require absolute uniformity in rates, and a rate which is not found to be violative of the sections of the Act prohibiting unjust discriminations and undue prejudices and preferences cannot be condemned as unreasonable merely because it is out of harmony with other rates which are not themselves a proper standard of maximum reasonable rates. The rates assailed had been prescribed by the Commission, and could not lawfully be condemned as unreasonable by mere comparison with rates prescribed in the same report to other points, in the absence of a specific finding that the latter rates were a proper standard of maximum reasonable rates. No such finding was made by the Commission.

III.

If the order was otherwise within the Commission's power to make, it is void because the hearing that was accorded the carriers was inadequate and manifestly unfair. The Commission's refusal to reopen and rehear the issues in the related cases, with which this case was originally decided, involving the rates to South Dakota and the gateways, and its refusal to consolidate

and hear or consider upon the same record the issues pending before it as to the relationship between the assailed rates and the rates from Wyoming to the same destinations, was in substance and effect a refusal to consider the intrinsic reasonableness of the rates assailed.

ARGUMENT.

I.

THE DISTRICT COURT DID NOT ERR IN FINDING AND HOLDING THAT THE COMMISSION EXCEEDED ITS POWERS IN DENYING THE PETITION FOR REHEARING BECAUSE OF CHANGED CONDITIONS, FILED FEBRUARY 3, 1932.

(a) *The Circumstances Here Present do not Differ Materially from Those Considered In Atchison, Topeka & Santa Fe Railway Company v. United States,* 284 U. S. 248.

Appellants and interveners seek to distinguish this case from *Atchison, Topeka & Santa Fe Railway Company v. United States,* 284 U. S. 248, hereinafter called the Grain Case, because of differences in the nature of the proceeding before the Commission, the extent of the rate adjustment affected by the order, the number of carriers complaining, and the amount of revenue involved. In their attempts thus to distinguish the facts in this case, appellants and interveners mistake the principles upon which the Grain Case was decided and the grounds on which the rehearing in this case was sought. Their fundamental error consists in supposing that the only change in conditions alleged either in this case or in the Grain Case was the decline in the general revenues of the carriers since the beginning of the present depression.

The change in conditions which was set forth in the petition for rehearing in this case, and which made necessary a rehearing in the Grain Case, was not a mere decline in carrier revenues but was a changed economic order of things, accompanied by a radical change in methods of carrying on the com-

merce of the country, a shifting of traffic to new modes of transportation and distribution, and a serious decline in the traffic of the railroads. The case of *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S. 541, and other cases cited in the brief of the interveners in support of the proposition that the adequacy or inadequacy of the earnings of a railroad or a group of railroads from the entire body of rates is not relevant in an inquiry as to the reasonableness of particular rates, are wholly beside the point. Counsel for interveners are so far misled as to urge that the decision of this Court in the Grain Case was wrong and should not be followed.

The rule announced in the Grain Case was based on the fundamental and self-evident proposition that the reasonableness of railroad rates must be determined by the facts as they exist when it is sought to put such rates into operation, and that, since a fair hearing is a fundamental requirement to the validity of any order reducing railroad rates, no such order can be sustained if based solely upon a hearing which related to conditions which had been radically changed, and a hearing suitably requested which would have permitted the presentation of evidence relating to existing conditions was denied. The Court held that a petition for rehearing on the ground of changed conditions which had supervened since the record before the Commission was closed, is not an ordinary petition, the granting or denial of which is within the Commission's discretion, but is in the nature of a supplemental bill which, if well founded, is not within the permitted range of the Commission's discretion to deny.

The petition for rehearing of February 3, 1932, in this case was manifestly the same kind of petition as was considered and held to be in the nature of a supplemental bill in the Grain Case. It was not addressed to the discretion of the Commission. It

asserted that whatever might be the view of the order when made and upon the record as made, a changed economic condition demanded reopening and reconsideration. Whether it was well founded or not depended upon the truth and materiality of the facts asserted, but if it was well founded, the Commission had no alternative but to grant it.

No question was made then or is made now as to the truth of the allegations presented in the petition for rehearing. The Commission's denial of the petition could therefore mean only that the admitted change in conditions which had occurred since the record was closed, was regarded by the Commission as of no consequence in the adjustment of the rates to which the order related. Such a view of the order is manifestly untenable and the denial of the petition was plainly error.

There can be no real question as to the relevancy and materiality of the changed conditions asserted. The most outstanding fact alleged is the decline in traffic upon the lines of the principal carriers affected by the order, amounting to 32.48 per cent in freight traffic and 37.02 per cent in passenger traffic. It is well settled that, in determining just and reasonable rates, consideration must be given to density of traffic. *Sames, Moore & Company v. A. T. & S. F. Ry. Co.*, 113 I. C. C. 501 (506). No rule is more firmly grounded in reason or more universally recognized than that the greater the tonnage to be transported, the lower the rate of freight charges therefor. *Tift v. Southern R. Co.*, 138 Fed. 753.

The petition for rehearing further alleged that there had been a change in economic conditions and in methods of transportation and distribution, as a result of which the freight rate structures of the carriers affected by the order were undergoing many revisions, including rate reductions to meet the competition of other forms of transportation; that these revisions

would necessitate rate increases on other traffic able to pay increased rates; that the traffic affected by the order was moving freely and had increased in volume under the existing rates, and that these rates could reasonably and profitably be advanced, even under existing conditions, without unduly burdening the traffic or diverting it to other means of transportation. These claims, if true, were necessarily relevant and material to the determination of the reasonableness of the rates affected by the order. It has long been recognized in this country that what the traffic will reasonably bear is one of the considerations affecting the establishment of freight rates, and that the existing rate structure of the railroads has been developed largely on this principle. When, by reason of a radical change in economic conditions, the rates on many classes of traffic become more than the traffic will bear because of the competition of new agencies of transportation, it is plain that the whole rate structure must undergo revision upon new and different principles. This was plainly recognized by the Commission in *Fifteen Per Cent Case, 1931*, 178 I. C. C. 539 (R. 199-200), and the Commission there found that it was "evident that the traffic departments must give new thought to the rate structure in the light of existing conditions." In view of the expressions of the Commission in *Fifteen Per Cent Case, 1931*, it is difficult to understand the process of reasoning by which the Commission concluded, if it did so conclude, that the changed conditions asserted in this case were not relevant or material to its order.

It is argued in the brief for appellants that this Court could not have intended by its decision in the Grain Case to require the Commission to reopen and rehear every case heard, either in whole or in part, before the full effects of the depression became evident, and that the Court must have intended that a

discretion was left in the Commission as to what cases should be reopened for the purpose of bringing the records down to date. It is manifestly unsound to assert that any discretion was left in the Commission with respect to petitions for rehearing in the nature of supplemental bills on the ground of changed conditions. The granting or denial of such petitions obviously depends upon the determination of questions of law and fact and not upon discretion. But it does not follow from this that every such petition must be granted by the Commission. It may well be that in the many cases where the Commission has prescribed a single rate or a few rates upon records closed before the full effect of the present depression became evident, the change in conditions will have no material bearing on the conclusions reached by the Commission or the order made, because the rates dealt with are merely an insignificant portion of a large adjustment of rates. The present case, however, is not of that character. The Commission was not dealing with a single rate or a few rates, but with a large body of rates from the entire Southwest to a large and clearly defined destination territory. The Commission's disposition of these rates did not affect them alone, but necessarily affected another large body of competitively related rates from points in the states of Wyoming and Montana, and from Superior, Wisconsin, and the Twin Cities to the same destination territory.

The question before the Commission for determination was essentially the level of maximum reasonable rates on refined petroleum products from the entire Southwest to a large territory embracing North Dakota and South Dakota, and portions of Minnesota and Iowa. It is thus apparent that the issues before the Commission related to rates on a major description of the traffic of the carriers in a vast territory, and were of such substantial character that a record which was closed in Jan-

uary, 1930, could not reasonably be regarded as representative of conditions existing in March, 1932. The differences between this case and the Grain Case are mere differences of degree which do not affect or alter the principles applicable.

There is a further consideration. It is true that the earnings of the carriers from their entire body of rates sheds little light on the question whether the rate on a particular article is reasonable. But section 15a (2) of the Interstate Commerce Act requires the Commission, in the exercise of its power to prescribe just and reasonable rates, to initiate, modify, establish or adjust such rates so that the carriers (as a whole or by rate groups or territories) will earn a fair return upon the aggregate value of their properties held for and used in the service of transportation. The Commission has only reasonable latitude "to modify or adjust any particular rate which it may find to be unjust or unreasonable." Whether the duty enjoined by section 15a (2) is to be performed by separate adjustment of particular groups of rates or only by adjustment of the whole body of rates at one time is not made clear. In *Fifteen Per Cent Case, 1931*, the Commission found that under existing conditions its duty could not practicably be performed by consideration of the whole body of rates, but that separate consideration had to be given to the justness and reasonableness of individual rates (R. 178), and it advised the railroads to study their rate structures with a view to making such changes in the rates on particular kinds of traffic as would be likely to increase revenues (R. 192). By this action, the Commission made the question of general carrier revenues a relevant and material consideration in the investigation of individual rates, wherever the scope of the inquiry might have a substantial effect upon the revenues of the carriers. This is plainly such a case, and the Commission cannot justify its refusal to consider the effect of

its order upon the revenues of the carriers and the relation of the rates in question to railroad revenues.

(b) *The Action Taken by the Commission in Fifteen Per Cent Case, 1931, did not Relieve it of the Duty to Rehear this Case in Respect of Changed Conditions.*

Appellants and interveners rely largely upon the contention that because in *Fifteen Per Cent Case, 1931,* the Commission permitted increases of one cent per 100 pounds in all rates on gasoline and refined petroleum oils, the Commission was relieved of the necessity of granting a rehearing of an order reducing substantially a large body of rates on gasoline and refined petroleum oils. The District Court held that if the Commission did take into consideration in deciding the present case the changed economic conditions which had been disclosed in *Fifteen Per Cent Case, 1931,* and the increases there authorized on account thereof, and was of the opinion that the order which it had made in this case was a fair and proper order, taking these conditions into consideration, such opinion on the part of the Commission was not the equivalent of a hearing because it gave no opportunity to the carriers to present evidence or arguments (R. 286). The Court was obviously right. The report of the Commission in *Fifteen Per Cent Case, 1931,* expressly states that "in such a general rate proceeding as this, involving primarily revenue considerations, we cannot undertake to consider the justness and reasonableness of individual rates." Obviously, a hearing in which the Commission could not undertake to consider the justness and reasonableness of individual rates cannot serve as a substitute for a fair hearing in a proceeding in which the Commission undertakes to reduce substantially individual rates.

If in the instant case the Commission had undertaken to prescribe rates on petroleum and its products, which would impose on that traffic in relation to the rates contemporaneously maintained on other commodities and classes of traffic a fair share of the transportation burden, and if in *Fifteen Per Cent Case, 1931*, the Commission had undertaken to adjust the general level of all rates so as to enable the carriers to earn a fair return upon the aggregate value of their properties, there might be force to the contention that the Commission was not obliged to grant a rehearing of the present case because of changed conditions. But the Commission did neither. It adjusted the rates in issue solely in relation to other rates on refined petroleum products which it had theretofore uniformly held to be below the level of maximum reasonable rates. In *Fifteen Per Cent Case, 1931*, it authorized certain admittedly inadequate and insufficient temporary increases in certain selected rates, and relegated the carriers to a study of their rate structures for the purpose of locating rates on particular kinds of traffic which might reasonably be increased in the interests of increased revenues. The contention that such action resulted in according the carriers a fair hearing in respect of existing conditions material to the rates here in issue is manifestly without any support in the facts.

(c) *Appellees were not Guilty of Laches Justifying Denial of a Rehearing in Respect of Changed Conditions.*

There is no basis here for the claim that because appellees did not apply for a rehearing of this case upon the ground of changed conditions early in 1931, and before the order of December 1, 1931, was made, they were barred by their laches from demanding a rehearing in respect of changed conditions. The District Court disposed of this contention by holding that

"an order which has the effect of reducing the revenues of the petitioners substantially does not affect them alone but is a matter of public interest; and if the order reducing the rate is wrong or if it was made upon a record which does not now justify its existence, or if the carriers were denied a fair hearing, it should be set aside, not only in the interest of the carriers, but in the public interest as well" (R. 286). In addition to this obviously sound proposition, it is plain that appellees are not chargeable with laches. They, with other railroads in the United States, diligently pursued what appeared to be the most practical remedy for the plight in which they found themselves as a result of the changed economic conditions when they applied to the Commission in June, 1931, for authority to make a fifteen per cent increase in all freight rates and charges. They failed to obtain the relief sought. It cannot be said, however, that their pursuit of that remedy and their failure to apply to the Commission for a rehearing in the present case before *Fifteen Per Cent Case, 1931* was finally decided operated to the prejudice of the complainants in this case or constituted an acquiescence in the determination of reasonable maximum rates on the traffic involved upon the conditions of 1929.

Mere lapse of time in asserting a right does not constitute laches. It is essential that there be also acquiescence in the alleged wrong or lack of diligence in seeking a remedy. Nor does failure to pursue the appropriate remedy, though well known, establish laches where there has been due diligence and the other party was not prejudiced by the delay. *Southern Pacific Company v. Bogert*, 250 U. S. 483.

In view of the magnitude of the rate adjustment affected by the order and the number of carriers whose interests had to be consulted, appellees proceeded with reasonable promptness in filing on February 3, 1932, their petition for rehearing of the order served on them on December 21, 1931.

II.

THE DECREE IS RIGHT AND SHOULD BE AFFIRMED FOR INVALIDITY OF THE COMMISSION'S ORDER UPON THE OTHER GROUNDS ALLEGED IN THE BILL.

The petition filed in the District Court alleges among other things that the Commission's order is void because the report shows on its face that the power which the Commission assumed to exercise in this case was not the power to fix maximum reasonable rates or to remove unjust discriminations or undue prejudices, but was a power, not possessed, arbitrarily to reduce otherwise lawful rates for the purpose of bringing about what it conceived to be reasonable and consistent relationships between the rates in issue and other rates not brought in issue, and because the hearing accorded the carriers was inadequate and manifestly unfair by reason of the denial of the various petitions of the carriers for enlargement of the investigation so as to permit of adequate consideration of the reasonableness and propriety of the rates assailed (R. 13). The District Court found and held that it did not sufficiently appear from the report that the Commission had disregarded the reasonableness of the rates as such, and that the denials by the Commission of the petitions for consolidation of this proceeding with other proceedings were within its discretion. In reaching these conclusions, we think the court failed to give adequate consideration to the circumstances attending the Commission's investigation and decision of the issues presented and that the order should have been held void on these grounds as well.

It is clear that appellees may urge these contentions here in support of the decree, although they have taken no cross appeal.

United States v. American Ry. Express Co., 265 U. S. 425, 435; *Langnes v. Green*, 282 U. S. 531, 538.

(a) *The Commission's Order is Void Because of its Attempt to Exercise a Power not Possessed by it Arbitrarily to Reduce Otherwise Lawful Rates Because of their Relation to Other Rates not in Issue Which were not a Proper Standard of Maximum Reasonable Rates.*

The Commission's report shows that the reductions ordered were required solely because the rates assailed were deemed not properly related to rates previously prescribed to South Dakota and the gateways. The standard of measurement used to condemn the assailed rates was the percentage relation of the South Dakota rates to a scale of first class rates applied to the mileages over the shortest possible routes to the destination territory involved, and not over the routes over which the traffic in issue is usually moved. The rates to South Dakota thus used as the standard of measurement had been prescribed by the Commission in the same report as the rates which were condemned, and obviously, had no more solid foundation as a standard of reasonableness than the rates which were condemned. Neither set of rates had been prescribed by the Commission with a view to establishing maximum reasonable rates, but had been established solely for the purpose of creating a more consistent and reasonable relationship of rates as between those rates and depressed competitive rates to other points (R. 86). It is self-evident that a mere comparison of the rates prescribed to South Dakota with those prescribed in the same report to North Dakota and northwestern Minnesota would prove nothing with respect to the reasonableness of either set of rates. The rates assailed would tend to show that the rates prescribed to South Dakota were too low, while those to South Dakota

would equally tend to prove that the rates assailed were too high. Both might be too low because compelled by conditions over which the carriers had no control. *Louisville & Nashville Railroad Company v. United States*, 238 U. S. 1, 12.

In its report the Commission did not set up any standard of maximum reasonable rates by which to judge of the reasonableness of either set of rates and it made no finding that the rates previously prescribed to South Dakota or to the gateways were maximum reasonable rates, or a proper standard thereof. One of the dissenting Commissioners expressly stated that the Commission had repeatedly stated that the rates required by the Commission in its prior reports in the Midcontinent cases were below reasonable maxima, and no language was placed in the majority report to indicate that the Commission otherwise regarded the rates prescribed to South Dakota and the gateways. Under these circumstances, it seems self-evident that the power which the Commission undertook to exercise in making the order here in question was not the power to fix maximum reasonable rates under the standards of the Interstate Commerce Act. It is not claimed on behalf of the Commission that the power sought to be exercised was the power to remove unjust discriminations or undue prejudices, because the Commission made no findings pertinent thereto.

The court below held that it must be assumed in the absence of the record upon which the report was based that the Commission reached the conclusion that the South Dakota rates at the time of the hearing represented reasonable maxima and furnished a proper basis for determining the reasonableness of the rates assailed (R. 281). It said: "While it may be true here that the Commission overlooked the question as to whether the rates prescribed by it were intrinsically unreasonable, we do not think that that sufficiently appears from the face of the

report, and the Commission denies that it failed to consider that factor." The view thus taken by the District Court, we respectfully submit, is not warranted by the record in this case. In view of the expressions of the Commission to the contrary in the report prescribing the rates to South Dakota and in subsequent reports, and in view of the Commission's repeated refusals to reopen and rehear the question of the reasonableness of the South Dakota rates, it cannot legitimately be assumed that the Commission changed its mind and reached the conclusion that the rates to South Dakota were maximum reasonable rates in the absence of a clear statement in the report to that effect.

The Commission's ultimate finding, couched in the language of the Act, that the rates assailed would be unreasonable for the future to the extent they exceeded those prescribed is not sufficient to support the Commission's order where, as here, it plainly results from a consideration of the entire report that the finding of unreasonableness was not made in the exercise of the Commission's statutory authority, but was made upon the assumption by the Commission of the possession of a power not conferred by law. *Southern Pacific Company v. Interstate Commerce Commission*, 219 U. S. 433. It is well settled that an order of the Commission must be set aside where it appears that the order is beyond its statutory power, or where, although the order be in form within the delegated power, the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power.

Interstate Commerce Commission v. Illinois Central Railroad, 215 U. S. 452.

Interstate Commerce Commission v. Union Pacific Railroad, 222 U. S. 541.

Interstate Commerce Commission v. Louisville & Nashville Railroad, 227 U. S. 88.

We think it will not be claimed that the Commission possesses the power which we contend it undertook to exercise in this case. The Commission does not possess the power to reduce freight rates for any reasons which seem to it good, but may reduce them only upon a proper finding supported by evidence that they are unreasonable or otherwise unlawful under the standards of the Interstate Commerce Act. In *Southern Pacific Company v. Interstate Commerce Commission*, 219 U. S. 433, it was held that the Commission did not possess the power to condemn a rate as unreasonable merely because it believed that the lumber interests of the Willamette Valley were equitably entitled to protection from an increase in rates. In *Ann Arbor R. Co. v. United States*, 281 U. S. 658, it was held that the Commission was without power to reduce a rate which had been found reasonable and lawful under the standards of the Interstate Commerce Act, merely because the industry was depressed, or because it believed that it was under a duty to place products of agriculture in a more favored class in the adjustment of freight rates. It seems equally clear that the Commission is without power to reduce freight rates which are not unreasonable under the standards of the Interstate Commerce Act, merely because of its desire for arithmetical symmetry in an adjustment of rates, or because of its belief that consumers of petroleum products situated in North Dakota and northwestern Minnesota are entitled to as favorable treatment at its hands as it had accorded consumers situated in South Dakota.

(b) *The Order is Void Because the Hearing Accorded the Carriers was Inadequate and Manifestly Unfair.*

Only two views of the Commission's action are possible. Either the Commission concluded that the rates which it had previously prescribed to South Dakota constituted a proper standard of maximum reasonable rates by which to determine maximum reasonable rates to North Dakota, or it concluded that equitable relationships of rates were of such primary importance that the rates in issue should be reduced, regardless of their reasonableness, to harmonize with other rates which could not be revised because not in issue. If the Commission's action was of the latter character, as we believe it was, the Commission's refusal to consolidate with this proceeding the proceedings also pending which brought in issue the relationships between the assailed rates and the competitive rates from Wyoming, and its refusal to give any effective consideration in this proceeding to those relationships was clearly arbitrary, and evinced an utter disregard for the substantial rights of the carriers. The District Court viewed the Commission's action as an attempt to fix intrinsically reasonable rates, and held that the carriers "had no absolute right to require that other controversies affecting other shippers and other territories be injected" (R. 284). We shall, therefore, consider the case from this viewpoint.

From the very inception of this proceeding, the Commission has considered the issues as involving the establishment of equitable relationships of rates rather than the establishment of maximum reasonable rates, and the carriers have at all times been required to defend and justify the rate relationships in the rate structure as well as the intrinsic reasonableness of the rates themselves. If, in the consideration of the rates here in controversy, the Commission could have put out of view its overweening insistence upon equitable rate relationships, we

agree that a fair hearing could have been accorded the carriers upon the question of the reasonableness of the rates which the Commission had prescribed to North Dakota and northwestern Minnesota, without bringing in issue the rates which had been contemporaneously prescribed to South Dakota. But the Commission's report shows conclusively that it was not able to do this. The result was that appellees did not receive a fair hearing of the reasonableness of the rates assailed to North Dakota and northwestern Minnesota, and could not obtain such a hearing with the rates previously prescribed to South Dakota not included within the scope of the investigation. It is no answer to this to say, as does the District Court, that the Commission could hear and consider in this proceeding the collateral question whether the South Dakota rates were a proper standard of maximum reasonable rates and upon such consideration reach the conclusion that the rates assailed were not too high, which would have ended the controversy. The fact remains that the South Dakota rates, not being in issue, were not subject to revision in this proceeding to correct any rate relationships which the Commission might regard as inequitable, and it was an intellectual impossibility for the Commission, with its settled convictions regarding the necessity for equitable rate relations in this rate adjustment, to accord the carriers a fair hearing upon the question of intrinsic reasonableness of the rates assailed, with the South Dakota rates not before it for revision.

The Commission is authorized by section 17 (1) of the Act, (U. S. Code Title 19, Section 17) "to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." The validity of its proceedings is not dependent upon compliance with the strict procedural rules as to pleading and practice which prevail in courts of law. But the more liberal its authorized procedure, the more

important it is that its proceedings shall recognize and protect the substantial rights of the parties and conduce to the ends of justice.

Interstate Commerce Commission v. L. & N. Rd. Co., 227 U. S. 88, 91.

A. T. & S. F. Ry. Co., et al. v. United States, et al, 284 U. S. 248.

Under the circumstances present in this case, the procedure which was followed by the Commission, and its action in restricting the issues to those presented by the complaint of the complainants in No. 17304 and in denying all of the petitions and requests of the carriers for an appropriate enlargement of the issues, resulted in a failure to recognize and protect the substantial rights of the carriers, and hence did not conduce to the ends of justice. The order of December 1, 1931, if not otherwise open to attack, is void for this reason, and the decree below is right.

CONCLUSION.

It is respectfully submitted that the decree of the court below is right and should be affirmed.

M. L. COUNTRYMAN, JR.,
Attorney for Appellees,
1006 Northern Pacific Railway
Building, St. Paul, Minnesota.

D. F. Lyons,
F. G. Dorety,
J. N. Davis,
P. F. Gault,
A. H. Lossow,
R. J. Hagman,
J. P. Plunkett,
Of Counsel.

St. Paul, Minnesota,
February 1, 1933.

APPENDIX.

The following provisions of the Interstate Commerce Act, as amended, are pertinent in this case:

Sec. 1 (5). "All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful" * * *.

Sec. 3 (1). "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Sec. 13 (1). "That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall

be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Sec. 15a (2). "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(3). "The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920,